

1
2
3
45 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA
78 SANDRA L. KINNEY, *et al.*, No. C-12-4477 EMC9 Plaintiffs, **RELATED TO**

10 v. No. C-12-4478 EMC

11 BRISTOL-MYERS SQUIBB COMPANY, *et* No. C-12-4615 EMC
al., No. C-12-4616 EMC

12 Defendants. No. C-12-4617 EMC

13 _____/ No. C-12-4619 EMC

14 AND ALL RELATED ACTIONS. No. C-12-4633 EMC

15 _____/ No. C-12-4641 EMC

16 _____/ No. C-12-4642 EMC

17 _____/ No. C-12-4803 EMC

18
19 **ORDER RE SUPPLEMENTAL
BRIEFING**20 As the parties have informed the Court, the Judicial Panel on Multidistrict Litigation
21 (“MDL”) recently denied without prejudice transfer of the above-referenced cases. The Court thus
22 has pending before it Plaintiffs’ motions to remand.23 The Court directs the Plaintiffs to file supplemental briefing. Defendants have taken the
24 position that a distributor cannot issue additional warnings beyond those contained in the FDA-
25 approved labeling or, under federal law, they will be subject to civil and/or criminal penalties for
26 misbranding. In their supplemental brief, Plaintiffs should address why a distributor would not be
27 liable for misbranding under federal law if it were to issue such additional warnings beyond those
28 contained in the FDA-approved labeling. The Court notes that it previously asked for supplemental
briefing on this very issue in the *Caouette* case, *see Caouette v. Bristol-Myers Squibb Co.*, No. C-12-

1 1814 EMC (Docket No. 41) (Order at 2) (asking “what should McKesson have done in the instant
2 cases to satisfy [the] duty [to warn]” and “how are those actions not inconsistent with or prohibited
3 by federal law”); however, the *Caouette* Plaintiffs did not directly respond, focusing instead on the
4 argument that *Mensing* applies only in the generic drug context. *See id.* (Docket No. 44) (Pls.’
5 Supp. Br. at 8). Plaintiffs in the cases at bar have similarly argued that *Mensing* is restricted to the
6 generic drug context. *See, e.g., Kinney v. Bristol-Myers Squibb Co.*, No. 12-4477 EMC (Docket No.
7 18) (Reply at 10). Plaintiffs have yet to address the question (assuming the logic of *Mensing*’s
8 impossibility analysis applies here) why it is not impossible for a distributor to provide additional
9 warnings (as Plaintiffs contend is required by California law) and not contravene federal law.

10 Although Plaintiffs are represented by different counsel, the Court shall require Plaintiffs to
11 coordinate and file a single supplemental brief. The supplemental brief shall be filed by February
12 26, 2013.

13

14

IT IS SO ORDERED.

15

16

Dated: February 19, 2013

17

18


EDWARD M. CHEN
United States District Judge

19

20

21

22

23

24

25

26

27

28